

The respondent requests review of the following: (1) whether the claimant's accidental injury arose out of and in the course of employment; (2) whether the claimant

provided timely notice; and, (3) whether the claimant is entitled to temporary total disability and medical benefits. Respondent argues that claimant has failed to prove that her current back complaints are attributable to her alleged August 6, 2004 accident at work with respondent. Instead, respondent points to claimant's prior January 2004 slip and fall as the probable cause of her low back condition and need for surgery. Respondent further denies receiving timely notice of the alleged accident at work.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant was employed as a campaign account manager for respondent. Her job duties varied with the first few months of the year being devoted to administrative duties planning and preparing for the annual United Way campaign. During the United Way campaign from July through December, her job involved taking campaign materials to various sites along with providing information and presentations regarding the campaign in order to solicit contributions.

On the afternoon of August 6, 2004, claimant was to deliver material to Wichita State University. Claimant took four boxes from her office, loaded them onto a rolling cart and took it to the front desk. She noted each box weighed between 25 to 27 pounds. Claimant then got her car and took the boxes from the cart to her car. She noted she received assistance from a passer-by in order to load the last box because she was having difficulty grasping it. When claimant arrived at Wichita State University she was physically unable to get out of her car because her lower back felt as if it had locked. Claimant called her son and ultimately her daughter-in-law who met claimant and went with her to the Cypress Surgery Center. Claimant received an epidural injection at L5-S1 which she had already been scheduled to receive that day.

Claimant had a preexisting back condition from an earlier accident not related to her work with respondent. Claimant acknowledged having a preexisting back and left leg condition, but said the problem was in her upper back, not lower back.

However, claimant acknowledges seeing Dr. Jennifer D. Peterson in July 2004 because of low back pain. Claimant said that Dr. Peterson was "very concerned about the lower back area"¹ which resulted in a referral to a neurosurgeon, an MRI and being scheduled for an epidural injection in her lower back on August 6, 2004. Although that epidural had already been scheduled before claimant's alleged work-related worsening,

¹ P.H. Trans. at 27.

it was not actually performed until after the incident at Wichita State University on the afternoon of August 6, 2004.

In July 2004 claimant said she “began to feel a weakness in her lower back”² and sought additional treatment from her chiropractor, Dr. Peterson. This resulted in an MRI and a recommendation for epidural injections. In Dr. Peterson’s treatment records of August 3, 2004, claimant described having severe pain in her left leg that she rated as an 8 on a scale of 1-10. Claimant also related having bowel and bladder problems associated with her low back pain. Dr. Peterson suspected a herniated disk at that time and therefore referred claimant to a neurosurgeon, Dr. John P. Gorecki.

On August 5, 2004, claimant returned to Dr. Peterson. At that time she had difficulty walking because of the severe pain in her left leg. Claimant also saw Dr. Peterson on August 16, 17, 18, 19, 20, 23, 24, 26, 27, 30, September 1, 2, 7, 9, 10, 13, 15 and 20. On none of those occasions did claimant mention being injured at work on August 6, 2004.

Claimant first saw Dr. Gorecki on August 4, 2004, and Dr. Gorecki’s records of that visit contain a history of significant, constant, spontaneous, sharp low back pain since a fall on ice six 6 months earlier. Claimant saw Dr. Gorecki again at noon on August 6, 2004, which would have been just hours before the alleged accident later that same day. Claimant described her pain level at noon on August 6, 2004, to Dr. Gorecki as a 9 on a scale of 1-10. Dr. Gorecki noted that claimant was walking stiff legged, that she was uncomfortable sitting down and that she could not raise her left leg due to stiffness. He reported claimant having “incapacitating pain.”³ Dr. Gorecki scheduled claimant to have an epidural injection by Dr. Kent Cooper at 4:45 p.m later that same day, August 6, 2004.

Dr. Cooper’s August 6, 2004 record indicates that claimant presented with a two-week exacerbation of problems in her low back and although she saw him less than two hours after the alleged incident lifting the boxes she did not mention her alleged injury at work.⁴ Claimant said that she did not report the injury at work to Dr. Cooper because “I did not realize that that was why I was having that type pain at that time.”⁵

On August 10, 2004, claimant presented to the Wesley Medical Center emergency room in Wichita, Kansas. The records of that visit indicate claimant’s onset of pain was last December when she had an accidental fall. But claimant does not recall that visit because she was taking narcotic medication for her pain.

² *Id.* at 12.

³ *Id.* at 40.

⁴ *Id.* at 41.

⁵ *Id.* at 41-42.

Claimant's supervisor, Kandi LaMar, testified that she had observed claimant before August 6, 2004, and that during the days shortly before August 6, 2004, claimant appeared to be in quite a bit of pain.

Ms. LaMar further testified that when she spoke with claimant by telephone on the morning of August 9, there was no mention of a work-related injury. It was Ms. LaMar's understanding that this was a personal medical condition most likely related to her January 2004 slip and fall injury which had previously caused claimant to miss a considerable amount of work. The e-mails that Ms. LaMar sent to the personnel office concerning her conversations with claimant support Ms. LaMar's contention that she was unaware of any work-related connection to claimant's injury.⁶ Ms. LaMar testified that she was aware of claimant's condition, but was unaware of any allegation that it was work-related before receiving a letter from claimant's attorney shortly after October 4, 2004.⁷ Claimant's absence was treated as sick leave which was likewise consistent with the history claimant was giving her treating physicians.

The claimant had preexisting low back problems and was receiving treatment for that condition. She saw a physician for a previously scheduled medical appointment a short time before her alleged work-related incident and complained of nearly incapacitating back pain and was scheduled for an epidural injection. When she saw a doctor for an epidural injection later that same day she did not mention the alleged incident at work. When she sought emergency room treatment a few days later she never mentioned the alleged incident at work. As she continued to treat with her chiropractor she was seen approximately 18 times and yet never mentioned the alleged incident at work.

Based upon the testimony and the evidence presented, in particular the claimant's admissions regarding her medical treatment, the Board finds that claimant has failed to meet her burden of proof that she either permanently aggravated her preexisting low back condition or suffered an accidental injury arising out of and in course of her employment with respondent.

In addition, claimant did not provide respondent with timely notice of accident. Even assuming that claimant did leave a voice message with Ms. LaMar, all that she alleged she said was that while taking the materials to Wichita State University she was not able to get out of the car because of her back and would not be able to return to work that day. As Ms. LaMar was aware of claimant's ongoing back problems she could not conclude from that message that a work-related injury had occurred.

⁶ *Id.* at Resp. Ex. 1 and 2.

⁷ P.A. Trans. at 57.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge John D. Clark dated July 18, 2006, is reversed and compensation is denied.

IT IS SO ORDERED.

Dated this _____ day of November 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Joni J. Franklin, Attorney for Claimant
 Ronald J. Laskowski, Attorney for Respondent and its Insurance Carrier
 John D. Clark, Administrative Law Judge